



Preparatory Commission for the International Criminal Court

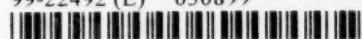
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Compilation of proposals on the crime of Aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996–1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999)

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A/AC.249/1997/WG.1/DP.6
21 February 1997

ORIGINAL: ENGLISH

PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT
11-21 February 1997
Working Group on Definition of Crimes

1. PROPOSAL SUBMITTED BY EGYPT AND ITALY ON THE DEFINITION
OF AGGRESSION

1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position to exercise control or capable of directing political/military actions in his State against another State, in contravention to the Charter of the United Nations, by resorting to armed force, to threaten or violate that State's sovereignty, territorial integrity or political independence.

2. Provided that the acts concerned or their consequences are of sufficient gravity,¹ acts constituting aggression [include] [are] the following:

(a) The invasion or attack by the armed forces of a State of a territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State, or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

¹ The possibility of specifying the criteria for assessing the sufficient gravity of the acts concerned or their consequences could be considered.

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.²

² In the context of the proposed inclusion and definition of the crime of aggression, a new paragraph 3 should be added after existing paragraph 2 of the ILC draft, which would read as follows: "The determination by the Security Council under paragraph 2 above shall not be interpreted as in any way affecting the independence of the Court in deciding on the commission of the crime of aggression by a given person." The existing paragraph 3 of article 23 of the ILC draft would be deleted.

A/AC.249/1997/WG.1/DP.20
11 December 1997

ORIGINAL: ENGLISH

PREPARATORY COMMITTEE ON THE ESTABLISHMENT
OF AN INTERNATIONAL CRIMINAL COURT
1-12 December 1997
Working Group on Definitions
and Elements of Crime

2. Proposal by Germany

Article 20

The Crime of Aggression

An Informal Discussion Paper

1. What is the purpose of this paper?

In accordance with its heading, this paper is an attempt to provide some "food for thought" for the continued opinion-building process among members of the United Nations. This process is, in the German view, indispensable for a more consolidated and more consensual definition of the crime of aggression in article 20 of the draft Statute of the International Criminal Court.

Being fully aware of the complexity and the many difficult aspects involved in a definition of the crime of aggression for the purpose of the Statute, the German delegation would be grateful if delegations of Member States could reflect upon the ideas and elements contained in this informal paper and take them into consideration when, at a later stage, we come back to a further debate on the draft consolidated text on the crime of aggression of February 1997 (as contained in UN Doc A/AC.249/1997/L.5, pages 14/15).

2. What is the German approach and position with regard to a definition of the crime of aggression?

Germany continues to support the inclusion of the crime of aggression in the Statute.

Not to include this crime would, in our view, be a regression behind the Nuremberg Charter of 1945, the ILC's Nuremberg Principles of 1950, the ILC's Draft Statute (Art. 20) of 1994 and the ILC's Draft Code of Crimes against the Peace and Security of Mankind of 1996. It would also amount to a refusal to draw an appropriate conclusion from recent history. The German side believes that we need the inclusion of this crime for reasons of deterrence and prevention, and in order to reaffirm in the most unequivocal manner that the waging of an aggressive war is a crime under international law.

We continue to favour a viable self-sustained definition, as short as possible, containing - in accordance with the principle of "nullum crimen sine lege" - all the necessary elements and precise criteria of a full international criminal norm which establishes individual criminal responsibility for this extremely serious crime of concern to the international community as a whole.

In accordance with historic precedents the definition in question should focus on and try to **cover only the obvious and indisputable cases of this crime** (such as the aggressions committed by Hitler and the one committed against Kuwait in August 1990*). This limitation seems indispensable, in particular for the following reasons:

- **It is of utmost importance that the definition does not lend itself to possible frivolous accusations of a political nature against the leadership of a Member State.**
- **It must be avoided that the definition somehow negatively affects the legitimate use of armed force in conformity with the Charter of the United Nations whose necessity - maybe unfortunately - cannot be ruled out in the future.**

At the same time, the inclusion of the crime of aggression should leave unimpaired the primary responsibility of the Security Council for the maintenance of international peace and security in accordance with Articles 24 and 39 of the Charter. Therefore, **the inclusion of Article 23 para. 2 of the ILC draft statute ("A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint") remains an integral part of the German position.** In our view, this provision could also be described as a merely declaratory clarification of the existing legal situation under the Charter.

On the other hand, we firmly believe that the inclusion of the formulation proposed in February "as determined by the Security Council" (see UN Doc./A/AC.249/1997/L.5, p. 14) in the definition of the crime of aggression itself is inappropriate and not acceptable. It would ruin the concept of a self-sustained, autonomous definition of the crime of aggression.

We share the view expressed by many delegations that **the armed attack on the territorial integrity of another State without any justification represents indeed the very essence of the crime of aggression.** While criminal norms concerning genocide, war crimes and crimes against humanity aim at protecting human life or physical integrity, a provision on the crime of aggression protects basically the territorial integrity of states from **flagrant and wilfull violations through means of war even if genocide, war crimes or crimes against humanity should not occur.** In (the probably more frequent) cases where aggression entails war crimes and crimes against humanity, the importance of such a provision lies in the individual criminal responsibility it establishes for the political and/or strategic military leadership of a state: **While war crimes or crimes against humanity committed in the field will often be difficult to be imputed to leaders in the centres of command, a provision on aggression aims exclusively and directly at those responsible for the war as such.** In such a situation, it may prove to be the only basis for holding them responsible. Aggression is, in our view, by definition a "leadership crime".

* It should be noted that the Security Council, while reacting very strongly to the invasion and annexation of Kuwait upon the orders of Saddam Hussein, in its relevant resolutions did not use the specific term "act of aggression" as contained in Article 39 of the UN Charter.

Within the general framework of these parameters, the German delegation remains open and flexible with regard to any further suggestions concerning the definition of the crime of aggression. In the end, what will be decisive, is to achieve a consensus as broad as possible on a definition that will be included in the Statute.

3. Why do we need further discussions and consolidation efforts with regard to the enclosed "draft consolidated text" on the crime of aggression?

In the German view, the progress achieved at the February 1997 session of the PrepCom in the direction of a more consensual and consolidated definition on the crime of aggression was significant and encouraging.

Nevertheless, the draft consolidated text still contains numerous brackets and many unresolved issues. In general, the current situation might be described as follows:

- There continue to be some States which seemingly have reservations and concerns with regard to the inclusion of aggression in the Statute;
- Within the group of those States supporting the inclusion of aggression in the Statute there continue to be some differences of view concerning specific elements of the definition in question.

The German side believes that in this particular situation it will be significant and helpful if those supporting the inclusion of aggression in the Statute continue and intensify their efforts to narrow down existing differences of view with regard to specific elements of the draft definition of aggression. Such progress in the direction of a more consolidated and more consensual text will also lead to greater clarity with regard to the essential elements of such a definition. Consequently, this may also alleviate some concerns on the side of those Member States which for the time being still have reservations with regard to the question of inclusion of the crime of aggression.

In this sense, we would like to bring about, if possible, a situation

- in which, ideally, the definitional problem as such is solved or is as close as possible to a viable solution;
- in which the sole remaining issue to be solved would be the question of the inclusion of Article 23 para 2 of the ILC Draft Statute concerning the responsibility of the Security Council (see section 2 above).

4. Should the definition of the crime of aggression include a full enumeration of the acts constituting aggression as contained in General Assembly resolution 3314 (XXIX) of 14 December 1974?

In our view this is a crucial question. It should not be left open and pending for too long as the decision on this question - as it seems - may influence the extent of general acceptance of the inclusion of the crime of aggression in the draft Statute.

In 1974, the German side joined and welcomed the consensus with regard to General Assembly resolution 3314. We continue to attribute great importance to this resolution.

On the other side, we have not failed to note some of the critical arguments against the use of the enumeration contained in res. 3314 for the purpose of defining aggression in a norm establishing individual criminal responsibility. We believe that these arguments need serious consideration, in particular with regard to the following questions:

- What about the argument that resolution 3314 was adopted in a different context, of a political nature, for a different purpose, as a political compromise achieved after long and painful debates?
- At the adoption of resolution 3314, was the possibility taken into consideration that this text, in particular the wide-ranging enumeration contained in article 3 of the annex of resolution 3314, might later be used for a criminal norm establishing individual criminal responsibility for the crime of aggression?
- Should a norm establishing individual criminal responsibility fulfill stricter standards of legal precision, clarity and certainty than a political resolution of the General Assembly?

A thorough debate of these questions would seem appropriate.

5. How might a consolidated definition of the crime of aggression - as outlined in this paper - eventually look?

For illustrative purposes, we would like to present tentatively a further amended version of the draft definition of the crime of aggression indicating - in accordance with our current thinking - the possible content of such a definition (follows text):

"Crime of aggression"

1) For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing political or military action of a State:

- (a) initiating or
- (b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations and resulted in the effective occupation by the armed forces of the attacking State or in the annexation by the use of force of the territory of another state or part thereof.

2) Where an act under paragraph (1) has been committed, the

- a) planning
- b) preparing or
- c) ordering

thereof by an individual who is in a position of exercising control or capable of directing political or military action of a State shall also constitute a crime of aggression."

Explanatory remarks:

- It should be noted that the formulation beginning with the words "and resulted..." is drawn from resolution 3314, annex, article 3 a). The incorporation of this additional element would be in line with the view expressed by many delegations that the deliberate armed attack on the territorial integrity of another State in contravention of the United Nations Charter represents indeed the essence of the crime of aggression. The qualifying requirement that the armed attack in question must have resulted in an effective occupation or an annexation seems to be therefore quite appropriate and is also in line with historic precedents of the crime of aggression. It is a compromise that singles out the most important example without specifically incorporating each illustration listed in the definition of 1974.

- The new structure of the provision, now consisting of two paragraphs, emphasizes that the acts of planning, preparing or ordering are punishable only when the armed attack in question has occurred

A/AC.249/1998/DP.12
1 April 1998

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PREPARATORY COMMITTEE ON THE
ESTABLISHMENT OF AN
INTERNATIONAL CRIMINAL COURT
16 March-3 April 1998

3. Revised proposal submitted by a group of interested States
including Germany

Article 5[20]

Crime of aggression

Note: This draft is without prejudice to the discussion of the issue of the relationship of the Security Council with the International Criminal Court with respect to aggression as dealt with in article 10[23].

"1. For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing political or military action of a State:

- (a) initiating or
- (b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [as determined by the Security Council] with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

2. Where an attack under paragraph 1 has been committed, the

- (a) planning

(b) preparing or

(c) ordering

thereof by an individual who is in a position of exercising control or capable of directing political or military action of a State shall also constitute a crime of aggression."



UNITED
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LIMITED

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1 July 1998

Rome, Italy
15 June-17 July 1998

Original: ENGLISH

COMMITTEE OF THE WHOLE

4. PROPOSAL SUBMITTED BY ALGERIA, BAHRAIN, THE ISLAMIC REPUBLIC OF IRAN, IRAQ, KUWAIT, LEBANON, THE LIBYAN ARAB JAMAHIRIYA, OMAN, QATAR, SAUDI ARABIA, THE SUDAN, THE SYRIAN ARAB REPUBLIC, TUNISIA, THE UNITED ARAB EMIRATES AND YEMEN

Article 5

Crimes within the jurisdiction of the Court

Crime of aggression

Option 2, paragraph 1

Rephrase the paragraph to read as follows:

"1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or is capable of directing political/military actions in his State, against another State, or to deprive other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten to violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples."

The remainder of the option should remain as it is.



**UNITED
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**United Nations Diplomatic
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Rome, Italy
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COMMITTEE OF THE WHOLE

PROPOSAL SUBMITTED BY ALGERIA, BAHRAIN, THE ISLAMIC REPUBLIC
OF IRAN, IRAQ, KUWAIT, LEBANON, THE LIBYAN ARAB JAMAHIRIYA,
OMAN, QATAR, SAUDI ARABIA, THE SUDAN, THE SYRIAN ARAB REPUBLIC,
THE UNITED ARAB EMIRATES AND YEMEN

The title of the document A/CONF.183/C.1/L.37, dated 1 July 1998, should
read as above.



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COMMITTEE OF THE WHOLE

5. PROPOSAL SUBMITTED BY ARMENIA

Article 5

Crimes under the jurisdiction of the Court

Crime of aggression

Note. The following amendments are proposed for consideration in order to contribute to the clarity of the definition of the crime of aggression in article 5 of the draft Statute.

Option 2

Paragraph 1

- Delete the square brackets.
- Insert the following wording, leaving the text as it is but adding the following sentence after the words "political independence of that State":
"except when this is required by the principle of equal rights and self-determination of peoples 1/ and the rights of individual or collective self-defence." 2/

Paragraph 2, subparagraph (c)

- Delete the words "of the ports or coasts".

-
- 1/ Article 1, paragraph 2, of the Charter of the United Nations.
2/ Ibid., Article 51.



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**United Nations Diplomatic Conference
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COMMITTEE OF THE WHOLE

6. PROPOSAL SUBMITTED BY CAMEROON

Article 5

Crimes within the jurisdiction of the Court

Proposals aimed at specifying the manner in which the crime of aggression (article 5) might fall within the jurisdiction of the Court, with the consequent reformulation of the relationship between the Court and the Security Council (article 10).

Crime of aggression

Option A

1. For the purpose of the present Statute, the crime of aggression is one of the following acts committed by an individual who is in a position of exercising control or capable of directing or guiding the political or military action of a State:

- (a) initiating,
- (b) planning,
- (c) preparing,
- (d) ordering, or
- (e) launching

the use of armed force by that State against the sovereignty, territorial integrity or political independence of another State when this use of force is in manifest contravention of the Charter of the United Nations.

2. The Court shall prosecute and punish the crime of aggression as defined in paragraph 1 of this article without prejudice to the powers exercised by the Security Council in regard to aggression under Chapter VII of the Charter of the United Nations.

Option B

1. For the purpose of the present Statute, and subject to the role performed by the Security Council in regard to aggression in accordance with article 10 of the present Statute, the crime of aggression is one of the following acts committed by an individual who is in a position of exercising control or capable of directing or guiding the political or military action of a State:

- (a) initiating,
- (b) planning,
- (c) preparing,
- (d) ordering, or
- (e) launching

the use of armed force by that State against the sovereignty, territorial integrity or political independence of another State when that use of armed force is in manifest contravention of the Charter of the United Nations.

N.B. Since of necessity this definition of the crime of aggression involves the relationship between the Court and the Security Council, a new formulation for article 10 appears to be necessary:

Article 10

Relationship between the Security Council and the Court

1. The Security Council shall determine the existence of aggression in accordance with the pertinent provisions of the Charter of the United Nations before any proceedings take place in the Court in regard to a crime of aggression.

2. The Security Council may determine the existence of aggression in accordance with paragraph 1 of this article:

- (a) On its own initiative;
- (b) At the request of a State which considers itself the victim of aggression;
- (c) At the request of the Court when a complaint relating to a crime of aggression has been submitted to it;

(d) At the request of any other organ of the United Nations which, under the Charter, is able to draw the attention of the Security Council to a situation likely to endanger the maintenance of international peace and security.

3. The Court, when a complaint relating to a crime of aggression has been submitted to it, shall suspend its deliberation and refer the matter to the Security Council for a declaration, in accordance with the pertinent provisions of the Charter, that the aggression does or does not exist. A letter from the President of the Security Council shall convey the Security Council's finding to the Prosecutor of the Court, accompanied by all supporting material available to the Council in regard to the aggression whose existence it has determined. (N.B. This sentence is a repetition of article 10, paragraph 2.)

4. Notwithstanding the provisions of paragraph 1 of this article, the Court may commence an investigation for the purpose of establishing whether a crime of aggression within the meaning of the present Statute exists, if the Security Council, having had the matter referred to it by the Court under paragraph 3 of the present article, does not reply within a reasonable time.

5. The Security Council, on the basis of a formal decision under Chapter VI of the Charter of the United Nations, may lodge a complaint with the Prosecutor specifying that crimes referred to in article 5 appear to have been committed. (N.B. This reproduces article 10, paragraph 3.)

6. The Court may request the assistance of the Security Council in conducting investigations into cases submitted to it, in arresting persons who are being prosecuted or have escaped from custody, or in enforcing its decisions.



UNITED
NATIONS



**United Nations Diplomatic
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on the Establishment of an
International Criminal Court**

Rome, Italy
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8 July 1998

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COMMITTEE OF THE WHOLE

7. PROPOSAL SUBMITTED BY ALGERIA, BAHRAIN, IRAQ, KUWAIT, LEBANON,
LIBYAN ARAB JAMAHIRIYA, OMAN, QATAR, SAUDI ARABIA, SUDAN,
SYRIAN ARAB REPUBLIC, TUNISIA, UNITED ARAB EMIRATES AND YEMEN

Article 5

Crimes within the jurisdiction of the Court

Crime of aggression

Option 2

Amend paragraph 1 as follows:

"1. For the purpose of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State against another State, or to deprive other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those peoples.

* Reissued for technical reasons.

2. Acts constituting aggression include the following:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State of the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."



**UNITED
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**United Nations Diplomatic
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9 July 1998

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Rome, Italy
15 June-17 July 1998

COMMITTEE OF THE WHOLE

PROPOSALS SUBMITTED BY ALGERIA, BAHRAIN, THE ISLAMIC
REPUBLIC OF IRAN, IRAQ, KUWAIT, LEBANON, THE LIBYAN
ARAB JAMAHIRIYA, OMAN, QATAR, SAUDI ARABIA, THE SYRIAN
ARAB REPUBLIC, THE SUDAN, THE UNITED ARAB EMIRATES AND
YEMEN

Corrigendum

The title of the document A/CONF.183/C.1/L.56, dated 8 July 1998, should
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26 February 1999
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**Preparatory Commission for the International
Criminal Court**

New York
16–26 February 1999
26 July–13 August 1999
29 November–17 December 1999

**8. Proposal submitted by Bahrain, Iraq, Lebanon, the Libyan Arab
Jamahiriya, Oman, the Sudan, the Syrian Arab Republic and Yemen**

Crime of aggression

1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, or depriving other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten or to violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people.

2. Acts constituting aggression include the following, whether preceded by a declaration of war or not:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State, or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement, or any extension of their presence in such territory beyond their termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above or its substantial involvement therein.

29 July 1999

Original: English

**Preparatory Commission for the
International Criminal Court**

New York

16–26 February 1999

26 July–13 August 1999

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9. Proposal submitted by the Russian Federation

Definition of the crime of aggression

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression.

30 July 1999

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**Preparatory Commission for the
International Criminal Court**

New York

16–26 February 1999

26 July–13 August 1999

29 November–17 December 1999

10. Proposal submitted by Germany**Definition of the crime of aggression**

1. For the purpose of the present Statute and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing the political or military action of a State:

- (a) initiating, or
- (b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

2. Where an attack under paragraph 1 has been committed, the

- (a) planning,
- (b) preparing, or
- (c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.
